Supreme Court, U.S.
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No. 01—

IN THE

Supreme Court of the United States

RIVERDALE MILLS CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The district court, at the urging of the United States, dismissed a two-count felony indictment against petitioner Riverdale Mills Corporation ("RMC") and its president and chief executive officer, James M. Knott, Sr. ("Knott"), for a regulatory offense under the Clean Water Act. The United States stated that the evidence was insufficient to sustain its burden of proof.

The district court granted petitioner RMC's subsequent motion for attorneys' fees and expenses under the Hyde Amendment, 18 U.S.C. §3006A (historical and statutory notes), finding as a fact that the government had no credible evidence to support the indictment and that the prosecution of RMC was "vexatious" within the meaning of the Hyde Amendment because it was conducted without any probable cause, noting, among other shortcomings, altered pH levels of RMC's rinsewater transcribed in EPA log books.

The court of appeals reversed, holding, contrary to the decisions of other circuit courts, that there must be "objective evidence of improper motive" and of "intent to harass or annoy" the defendants to establish that a prosecution was vexatious. The court also applied a *de novo* standard of review by declining to accord deference to the trial judge's findings of fact, and declined to remand the case for further proceedings consistent with its newly adopted definition of "vexatious."

The questions presented for review are:

1. Whether the court of appeals improperly defined the term "vexatious" as used in the Hyde Amendment to require, contrary to other circuits,

"objective evidence of improper motive" and of "intent to harass or annoy" in addition to proof of the absence of probable cause.

2. Whether the court of appeals improperly applied a *de novo* standard of review instead of reviewing the district court's findings of fact under an abuse of discretion standard.

3. Whether the court of appeals erred in refusing to remand the case for further proceedings, including opportunity for discovery consistent with the court of appeals' newly adopted definition of "vexatious," especially where, as here, there was evidence of altered pH readings, and where petitioner had proffered expert evidence showing that no Clean Water Act violation had occurred.

PARTIES TO THE PROCEEDING

All of the parties to the proceeding in the Court of Appeals for the First Circuit, whose judgment is sought to be reviewed, are

Riverdale Mills Corporation
James M. Knott, Sr.[1]
United States of America

There is no parent corporation of Riverdale Mills Corporation and no publicly held company owns any of its shares of stock.

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[1] Co-defendant, James M. Knott, Sr., against whom the indictment was also voluntarily dismissed, had also sought an award of attorneys' fees. The District Court denied recovery by Knott because his net worth rendered him ineligible under the net worth limitations of 28 U.S.C. §2412(d) which the court held was incorporated into the Hyde Amendment. The Court of Appeals affirmed the District Court decision in that respect. Mr. Knott, who was also represented by counsel for petitioner Riverdale Mills Corporation, does not seek further review in this Court.

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PETITION FOR A WRIT OF CERTIORARI

Riverdale Mills Corporation respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit in *United States of America v. James M. Knott, Sr. and Riverdale Mills Corp.* is reported at 256 F. 3d 20 (1st Cir. 2001) and is reprinted in the Appendix at App. 1a. The opinion of the United States District Court for the District of Massachusetts in *United States of America v. James M. Knott, Sr. and Riverdale Mills Corporation* is reported at 106 F. Supp. 2d 174 (D. Mass. 2000) and is reprinted at App. 30a. The judgment of the Court of Appeals entered on July 12, 2001 is unreported and reprinted at App. 29a.

JURISDICTION

The judgment of the United States Court of Appeals for the First Circuit sought to be reviewed was entered on July 12, 2001. (App. 29a). The time for the appellees to file their petition for rehearing and rehearing en banc was enlarged to and including August 10, 2001 by order of the Court of Appeals entered on July 26, 2001. (App. 46a). On August 24, 2001 the Court of Appeals entered an Order denying appellee RMC's timely petition for rehearing and its timely suggestion for the holding of a rehearing en banc. (App. 47a).

The jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

STATUTE INVOLVED

The statute which is the primary subject of this petition is the Hyde Amendment, Pub. L. No. 105-119, 111 Stat. 2440, 2519 (1997) (reprinted in 18 U.S.C.S. §3006A, historical and statutory notes). The full text of the statute follows:

> During fiscal year 1998 and in any fiscal year thereafter, the court, in any criminal case (other than a case in which the defendant is represented by assigned counsel paid for by the public) pending on or after the date of the enactment of this Act, may award to a prevailing party, other than the United States, a reasonable attorney's fee and other litigation expenses, where the court finds that the position of the United States was vexatious, frivolous, or in bad faith, unless the court finds that special circumstances make such an award unjust. Such awards shall be granted pursuant to the procedures and limitations (but not the burden of proof) provided for an award under section 2412 of title 28, United States Code. To determine whether or not to award fees and costs under this section, the court, for good cause shown, may receive evidence ex parte and in camera (which shall include the submission of classified evidence or evidence that reveals or might reveal the identity of an informant or undercover agent or matters occurring before a grand jury) and evidence or testimony so received shall be kept under seal. Fees and other expenses awarded under this provision to a party shall be paid by the agency over which the party prevails from any funds made available to the agency by appropriation. No new appropriations shall be made as a result of this provision.

STATEMENT OF THE CASE

The petitioner, Riverdale Mills Corporation ("RMC"), manufactures plastic-coated steel wire mesh at a manufacturing plant in Northbridge, Massachusetts. The manufacturing process involves two production lines, each of which utilizes contact rinsewater that is ultimately discharged into a publicly-owned wastewater treatment works of the Town of Northbridge ("POTW").

The rinsewater discharge from the galvanizing line is acidic, while the rinsewater from the coating line is caustic. The two neutralize each other when they are mixed within RMC's plant en route to a privately owned test pit located directly outside the plant (Manhole #1). From that pit the combined rinsewaters flow through 300 feet of a sewer line privately owned by defendant, Knott, to Manhole #2 where the public sewer begins. From there, the combined rinsewaters travel approximately three miles to the Northbridge POTW facility where, along with all other township wastewater, they are treated as necessary and discharged into the Blackstone River.

On October 21, 1997, two inspectors from the United States Environmental Protection Agency ("EPA"), acting on an alleged anonymous tip from an RMC employee, sought permission to inspect RMC's wastewater treatment system. Mr. Knott, president and chief executive officer of RMC, granted permission on the condition that the EPA officials be accompanied by RMC representatives at all times during their inspection.

Despite the express condition imposed by Mr. Knott, the EPA officials took several rinsewater samples from private Manhole #1 and one sample from public Manhole

#2 in the absence of any representative of RMC. The EPA asserted that these samples all had a pH below 5.0 s.u. Discharges of rinsewater below pH 5.0 s.u. into a POTW are prohibited under the Clean Water Act. See 40 C.F.R. §403.5; 33 U.S.C. §1251, *et seq.* There was only one reading at public Manhole #2 which was hand-recorded at 4.0 s.u.[2]

On November 7, 1997, approximately 21 armed EPA law enforcement agents made a surprise raid of RMC's plant—this time pursuant to a criminal search warrant. At that time, the EPA obtained seven rinsewater samples from the relevant public Manhole #2. All read above 5.0 s.u., within the legal limit prescribed by the Clean Water Act. (App. 33a). At no time did the EPA obtain or attempt to obtain any other rinsewater sample from public Manhole #2.

On August 12, 1998, a Grand Jury returned an indictment against RMC and Knott charging them in two counts with having violated the Clean Water Act on October 21 and November 7, 1997 by knowingly discharging rinsewater with a pH of less than 5.0 s.u. into a POTW sometime during each of those two days.

On October 14, 1998, RMC and Knott moved to suppress the evidence obtained from the EPA's surreptitious afternoon sampling on October 21, 1997. The district court allowed that motion on February 16, 1999,

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[2] The district judge, who conducted a hearing on the defendants' successful motion to suppress the unconstitutionally obtained evidence on October 21, 1997, found that the alleged 4.0 reading had actually been 7.0, but had been altered to appear as 4.0 (App. 32a, 40a, 49a, 50a).

finding that the EPA inspectors violated the fourth amendment rights of RMC and Knott by sampling rinsewater discharges in the absence of an RMC representative, contrary to the terms of Knott's conditional consent to the inspection. (App. 32a, 33a). The United States declined to appeal the suppression order.

On April 23, 1999, the government sought leave of court to dismiss the indictment because, in the course of preparing for trial, it determined that the evidence was insufficient to sustain its burden of proof for *either* count, even though the evidence that was suppressed related only to pH readings for October 21, 1997, that formed the basis of Count 1. The district court granted leave to dismiss the indictment on May 6, 1999. (App. 33a, 34a).

RMC and Knott timely filed their motion to recover attorneys' fees and litigation expenses pursuant to the Hyde Amendment. At the same time they moved for leave to conduct discovery to support their Hyde Amendment application. During the pendency of the Hyde Amendment proceedings, the defendants renewed their requests for an opportunity to conduct such discovery.

After consideration of RMC's Hyde Amendment motion and the government's opposition, Judge Nathaniel Gorton of the United States District Court for the District of Massachusetts (who had conducted the hearing on the motion to suppress evidence and was the only judge to see or hear any evidence in this case) ruled, without holding a hearing, that the government's prosecution of the defendants was "vexatious" within the meaning of the Hyde Amendment because he found as facts that "the government did not . . . have any credible evidence to support [the] accusation. To the contrary, the samples

taken at Manhole #2, the point of discharge into the public sewer, showed that RMC was not in violation of the Clean Water Act." (App. 40a). The district court did not find it necessary to address RMC's proffered expert evidence showing that readings below 5pH could not occur because of the configuration of the plant's rinsewater disposal system.

Judge Gorton defined "vexatious" as meaning "without reasonable or probable cause or excuse." (App. 39a). In addition to finding that the government lacked any credible evidence to support the indictment, Judge Gorton cited several instances of the EPA's vexatious conduct. Among them were his findings that:

- The EPA's collection of evidence was suspect because of the surreptitious sampling on October 21, 1997, in direct violation of RMC's and Knott's fourth amendment rights. (App. 40a).

- Obvious alterations in the EPA agent's field notes where neutral pH readings in the "7" range were changed to appear as acidic readings in the "2" and "4" ranges. (App. 40a, 49a, 50a, 51a, 52a).

- The government's failure to collect any additional wastewater samples at public Manhole #2 after all samples it had obtained there on November 7, 1997, proved to be innocuous and exculpatory, and despite the fact that the government was fully aware as early as December 1997 of Knott's claim of private ownership of the sewer pipe leading from Manhole #1 to Manhole #2 and of the street above that pipe. (App. 40a, 41a).

• The government's misrepresentation in its mandatory pretrial disclosures that "The United States is unaware of the existence of any exculpatory evidence," when, in fact, every pH reading at public Manhole #2 was at or above the legal minimum of 5.0 s.u. (App. 41a).

• The government's excessive zeal in executing the November 7, 1997 search when it stormed the defendants' premises with a virtual "SWAT team" of twenty-one EPA law enforcement officers and agents, many of whom were armed. The agents "vigorously interrogated and videotaped employees causing them great distress and discomfort." (App. 41a, 42a).

• The United States Attorney and the EPA exacerbated the defendants' humiliation at being criminally indicted by issuing press releases, on the day of the indictment, falsely accusing the defendants of knowingly polluting the rivers of the Commonwealth when they knew no evidence supported that conclusion. (App. 41a).

Based on all of these factual findings, Judge Gorton concluded that the government's prosecution of the defendants was "clearly vexatious." (App. 42a). He awarded fees and litigation expenses to RMC. The judge also denied the defendants' requests for discovery as moot. (App. 44a, 45a).

The government appealed to the United States Court of Appeals for the First Circuit. The First Circuit adopted a definition of "vexatious" that it acknowledged differed from the definition embraced by the district court and from the definition applied by other circuit courts of appeal.

The First Circuit required that in order for a prosecution to be "vexatious" within the meaning of the Hyde Amendment, it must not only lack legal merit or factual foundation, but also must be proven to have been based on "objective evidence of improper motive" and to have been undertaken with "intent to harass or annoy." (App. 19a, 17a).

Despite having adopted this unprecedented definition of "vexatious," the Court of Appeals declined RMC's suggestion that the case be remanded to the District Court for proceedings consistent with the newly defined standard. Instead, the Court of Appeals vacated the award of fees to RMC and remanded the Hyde Amendment application to the District Court for dismissal with prejudice. (App. 28a).

The Court of Appeals also failed to accord proper deference to the district judge's findings of fact on the issue of probable cause to support the prosecution. Instead of reviewing the district judge's findings for abuse of discretion, the Court of Appeals actually applied an improper *de novo* standard of review.

RMC's timely petition for rehearing and suggestion for rehearing *en banc* was denied on August 24, 2001. (App. 47a, 48a).

REASONS FOR GRANTING THE WRIT

1. This Court should review this case because the United States Court of Appeals for the First Circuit has entered a decision in conflict with the decision of all other United States Courts of Appeals that have addressed the same important matter. Since its passage four years ago, there have been a steadily increasing number of reported

cases based on the Hyde Amendment. The substantial likelihood that prevailing defendants in criminal cases initiated by the United States will increasingly resort to the amendment for recovery of their legal fees and expenses makes it important for this Court to interpret the language of the Hyde Amendment in order to provide guidance to the lower courts, the public, and the bar, and to resolve the conflict demonstrated by the decisions of those Courts of Appeals which have considered the issue.[3] This case provides the Court with an opportunity to resolve these circuit differences, and there is no sound reason to delay addressing this issue. Moreover, the First Circuit has decided an important question of federal law that has not been, but should be, settled by this Court.

2. The Court of Appeals also applied an incorrect standard of review. Instead of according deference to the district judge's findings of fact, as required by an abuse of discretion standard, the Court of Appeals reviewed his findings *de novo* and afforded them no deference whatsoever.

3. The Court of Appeals for the First Circuit has so far departed from the accepted and usual course of judicial proceeding as to call for an exercise of this Court's supervisory power. By adopting a definition of "vexatious" at odds with the standard applied by any other Court of Appeals as well as with the standard applied by the district judge, and then declining to remand the case to the district court for further proceedings consistent with the newly enunciated standard—including an opportunity for

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[3] *See Circuit Split Roundup*, 70 U.S.L.W. 2166 (Sept. 18, 2001) (describing circuit split between First Circuit and other circuits on the proper interpretation of the Hyde Amendment).

discovery—the Court of Appeals has deprived the petitioner of its right fully and fairly to present its case to meet the court's newly minted interpretation of the statute.

I. THE DECISION OF THE FIRST CIRCUIT CONFLICTS WITH DECISIONS OF OTHER UNITED STATES COURTS OF APPEALS ON THE SAME IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

In November 1997, Representative Henry Hyde, Chairman of the House Judiciary Committee, offered an amendment to an appropriations bill to enable defendants who prevailed in criminal prosecutions initiated by the United States to recover reasonable attorneys' fees and litigation expenses from the government. Representative Hyde was concerned about the irreparable damage to reputation and the considerable expense incurred by an innocent defendant who had been subjected to unfounded prosecution by the United States.

As originally proposed, the Hyde Amendment was modeled after the Equal Access to Justice Act ("EAJA"), 28 U.S.C. §2412, that applies in civil proceedings by or against the United States. The amendment would have permitted a prevailing criminal defendant to recover attorney's fees and expenses from the United States unless the government could prove that the prosecution was "substantially justified." The House of Representatives adopted the Hyde Amendment, but the Senate passed the appropriations bill without the amendment.

The Conference Committee compromised the differences by replacing the "substantially justified" standard of the EAJA with a requirement that a prevailing defendant must bear the burden of proving that the position of the United States was "vexatious, frivolous, or in bad faith, unless the Court finds that special circumstances make such an award unjust." The Hyde Amendment became law in that revised form.[4]

All United States Courts of Appeals which have ruled on the issue agree that a prevailing party in a criminal case brought by the United States may recover reasonable attorneys' fees and expenses under the Hyde Amendment if he can establish that the position of the United States was either vexatious, frivolous, or in bad faith. (18 U.S.C. §3006A, historical and statutory notes). Circuit Courts have differed, however, in their interpretation of the term "vexatious."

In *United States v. Gilbert*, 198 F. 3d 1293 (11th Cir. 1999), the Eleventh Circuit defined "vexatious" as "without reasonable or probable cause or excuse." 198 F. 3d at 1298-99. See *United States v. Adkinson*, 247 F.3d 1289 (11th Cir. 2001) (affirming *Gilbert's* definition of "vexatious"). The Fourth Circuit adopted the same definition *In Re: 1997 Grand Jury*, 215 F. 3d 430, 436 (4th Cir. 2000). The Sixth Circuit has weighed in with the Eleventh and the Fourth in *United States v. True*, 250 F. 3d 410, 423 (6th Cir. 2001). In *United States v. Sherburne*, 249 F. 3d 1121 (9th Cir. 2001) the Ninth Circuit held that a prosecution was "vexatious" under the Hyde Amendment

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[4] For a comprehensive review of the legislative history of the Hyde Amendment, see *United States v. Gilbert*, 198 F. 3d 1293, 1299-1303 (11th Cir. 1999).

only if it *both* lacked merit *and* was prosecuted with some *subjective* malice or intent to harass or annoy. See also *United States v. Lindberg*, 220 F. 3d 1120, 1125 (9th Cir. 2000) (resisting any rigid definition of "vexatious, frivolous or in bad faith"); *United States v. Beeks*, 2001 U.S. App. Lexis 20614 (8th Cir. 2001) (adopting *Gilbert's* definition).

The District Court in this case adopted the definition of "vexatious" enunciated in *Gilbert* and followed by most other circuits that have addressed the issue. The court found that the prosecution was vexatious because the government had no probable cause to support it.

The First Circuit's decision in this case rejects both the subjective malice standard of *Sherburne* and the absence of probable cause standard of *Gilbert*. The First Circuit attempts to strike a muddled middle ground by defining a vexatious prosecution as one which *both* lacks either legal merit or factual foundation *and* is proven to have been based on "*objective* evidence of improper motive." (App. 35a). The Court required proof that "the government's conduct when viewed objectively, manifests maliciousness or an intent to harass or annoy." (App. 17a).

The Court acknowledged that other circuits had applied conflicting definitions (App. 14a), but it adopted a definition that differed from any previously articulated. The issue is sufficiently important to justify review by this Court in order to provide a reliable definition for the guidance of lower courts, the public, and the bar on an issue which is arising with increasing frequency. *See* S. Ct. R. 10(a).

Moreover, the First Circuit's novel interpretation of the Hyde Amendment decides an important question of federal law that has not been, but, for the reasons heretofore indicated, should be, settled by this Court. *See* S. Ct. R. 10(c).

II. THE COURT OF APPEALS APPLIED AN IMPROPER STANDARD OF REVIEW.

All of the parties agree that the appropriate standard of review in Hyde Amendment proceedings is for abuse of discretion. Although the Court of Appeals paid lip service to that standard (App. 28a), it failed to apply it. Instead, the Court of Appeals accorded no deference to the district judge's findings of fact. It made its own findings, thereby so far departing from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power. See S. Ct. R. 10(a).

Every court of appeals that has considered the issue has held that the appropriate standard of review in Hyde Amendment proceedings is for abuse of discretion by the trial judge. An abuse of discretion occurs only if the district judge bases an award of attorneys' fees and expenses on findings of fact that are clearly erroneous. *United States v. Gilbert*, 198 F. 3d 1293, 1298 (11th Cir. 1999); *United States v. Lindberg*, 220 F. 3d 1120, 1124 (9th Cir. 2000); *United States v. Beeks*, 2001 U.S. App. Lexis 20614, 5 (8th Cir. 2001) (and cases cited therein).

In *United States v. Truesdale*, 211 F. 3d 898, 905-06 (5th Cir. 2000) the Fifth Circuit held, citing *Pierce v. Underwood*, 487 U.S. 552, 563 (1988), that the district court's findings of fact in awarding fees under the Hyde Amendment are entitled to deference for several reasons.

First, the district court is the only court with first-hand familiarity with the underlying facts. Second, the circuit court should not be burdened with evaluating the merits of the underlying case or the government's litigation strategy. See *United States v. True*, 250 F. 3d 410, 422 (6th Cir. 2001) (court generally reviews district court decisions regarding attorney's fees under a deferential standard).

The First Circuit's decision stands these principles of review for abuse of discretion on their head. Instead of according the required deference to the district judge's findings, the Court completely ignored them and substituted its own findings of fact as in a case of *de novo* review. It accorded no deference whatsoever to the district court's findings of fact.

The decision second guesses the trial judge. Where Judge Gorton found as fact, for example, that someone changed the only incriminating reading on October 21, 1997, at Manhole #2 from a 7 to a 4, (App. 32a, 49a, 50a) the Circuit Court cavalierly disregarded that factual finding, speculating that the altered reading could have been a simple mistake. (App. 20a). But the trial judge was not bound to conclude that it was a simple mistake. And he did not so conclude.

Another example is the Court of Appeals' disregard of the trial judge's finding that the "government knew, or should have known, that RMC's discharge did not enter the public sewer until it reached manhole #2, yet for unexplained reasons, the government failed to take further tests there." (App. 41a). This finding was firmly supported by the evidence presented at the suppression hearing. But the Court of Appeals improperly concluded

that the trial judge's finding of fact was wrong. (App. 20a).

Similarly, the Court of Appeals improperly discounted the district judge's finding that the government had withheld evidence of the exculpatory November 7, 1997 pH readings at Manhole #2. (App. 41a). While the district court emphasized the significance of that improperly withheld evidence, the Court of Appeals ignored it without any basis for finding that the trial judge's finding was clearly erroneous. (App. 21a).

The Court of Appeals inappropriately emphasized and relied upon the proffered and untested opinion of a government "expert" regarding the probability that acidic discharges of less than 3.0 pH at Manhole #1 would reach Manhole #2 at less than 5.0 pH. (App. 25a, 26a). However, the district judge never referred to this proffered opinion in its own decision. Nothing in the record establishes that the government obtained that opinion at any time prior to its motion to dismiss the indictments.[5] Moreover, the Court of Appeals conveniently failed to mention that the record before the district judge contained a detailed report and affidavit from the defendants' own expert that established the impossibility of a discharge of less than 5.0 pH into Manhole #2 based on conditions within the plant as reported by the EPA's own inspectors.[6]

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[5] The government's expert's affidavit of Brian McKeown is dated October 12, 1999. It appears as Tab 28 in the Joint Appendix (JA) filed at the Court of Appeals.

[6] The defendants' expert's report of James C. O'Shaughnessy, PhD., P.E., appears at Tab 13 of the JA.

Perhaps most important is the Court of Appeals disavowal of the district judge's factual finding that the government had no credible evidence to support the prosecution. (App. 40a). Without an opportunity to have heard the witnesses at the suppression hearing, the Court of Appeals improperly usurped the role of the trial judge and erroneously applied a *de novo* standard of review to his findings of fact.

III. THE COURT OF APPEALS IMPROPERLY REMANDED THE CASE FOR DISMISSAL WITH PREJUDICE INSTEAD OF REMANDING IT FOR FURTHER PROCEEDINGS CONSISTENT WITH THE COURT'S NEWLY MINTED DEFINITION OF "VEXATIOUS."

The district judge denied the defendants' several requests for leave to conduct discovery to support their Hyde Amendment motion. He did so initially without prejudice, and ultimately because the issue of discovery became moot as a result of his award of fees and expenses based on his determination that the prosecution was "vexatious" as the term was used in the Hyde Amendment. He did not believe that the law required a finding of objective malice. He applied the Black's Law Dictionary definition of "vexatious" as meaning "without probable cause or excuse" and relied on precedent established by *Gilbert*. (App. 39a). When the district judge decided this case, no court had ever defined "vexatious" to require proof of objective malice—whatever that may mean—or of intent to harass or annoy. The trial judge could not have foreseen that the Court of Appeals for the First Circuit would impose such a heavy and ambiguous burden of proof on a Hyde Amendment applicant.

The Court of Appeals' decision is replete with references to the absence in the undeveloped record of findings of objective malice or of an intent to harass or annoy the defendants. (App. 18a, 20a, 22a, 41a). But the district judge did not believe that proof of objective malice or of an intent to harass or annoy was required to establish that the prosecution was vexatious. He believed that a complete absence of credible evidence to justify the prosecution was sufficient.

If the district judge had known that the Court of Appeals would require proof of objective malice or of an intent to harass or annoy, he would most likely have allowed the defendants' motions to conduct discovery as expressly contemplated by the language of the Hyde Amendment.

The petitioner should not be deprived of its fee award because the Court of Appeals adopted a definition of "vexatious" that differed from that of any court that had previously addressed the issue. Under these circumstances, the appropriate disposition would have been to remand the case for further proceedings consistent with the newly adopted definition of "vexatious" including an opportunity for the petitioner to develop evidence through discovery of "objective malice" and of "intent to harass or annoy." See, e.g., *Millipore Corp. v. Travelers Ind. Co.*, 115 F. 3d 21, 41 (1st Cir. 1997) (Lynch, J.) (citing cases) (district court, with its extensive knowledge of the facts and proceedings is in a far better position than the Court of Appeals to address and first apply new case law; "justice requires" remand.) See also *United States v. Gardner*, 23 F. Supp. 2d 1283 (N.D. Okla. 1998) (Hyde Amendment itself provides for discovery controlled by the court *even where there has been a full trial of the underlying criminal case.*)

Accordingly, even if the Court of Appeals interpretation of the term "vexatious" is correct, the Court of Appeals so departed from the usual course of judicial proceedings by failing to remand the case as to call for an exercise of this Court's supervisory power.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

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UNITED STATES OF AMERICA, Appellant and Cross-Appellee, v. JAMES M. KNOTT, SR.; RIVERDALE MILLS CORP., Defendants, Appellees and Cross-Appellants.

No. 00-2238, No. 00-2239

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

256 F.3d 20; 2001 U.S.App.LEXIS 15586; 52 ERC (BNA) 1705

July 12, 2001, Decided

COUNSEL:

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Warren G. Miller, with whom Henry T. Dunker and Jamy B. Buchanan were on brief, for appellees and cross-appellants.

JUDGES:

Before Torruella, Circuit Judge, Cyr, Senior Circuit Judge, and Lynch, Circuit Judge.

LYNCH, Circuit Judge. This is a case of first impression for this court as to the standards for awarding attorneys' fees against the United States for its initiation of criminal proceedings, as provided for under the Hyde Amendment, Pub.L. No. 105-119, 111 Stat. 2440, 2519 (1997), reprinted in *18 U.S.C. § 3006A* (statutory note). The district court awarded $ 68,726.00 in fees to Riverdale Mills, which had been one defendant in a criminal prosecution for violation of the Clean Water Act, and denied fees to James Knott, the other defendant. The government voluntarily dismissed the action after the district court suppressed some of the prosecution's evidence. The district court awarded fees on the grounds that the government's prosecution was "vexatious." We reverse the award of fees to Riverdale Mills and affirm the denial of fees to Knott.

I.

Riverdale Mills Corporation and its principal owner, James Knott, operate a plant in Northbridge, Massachusetts, that manufactures plastic-coated steel wire mesh. The production involves two processes, one producing rather acidic wastewater, and the other producing quite caustic (i.e., alkaline) wastewater. Riverdale Mills ultimately discharges this industrial waste into the public sewer owned by the Town of Northbridge.

The Clean Water Act prohibits the indirect discharge of pollutants into the waters of the United States through publicly owned treatment works. *33 U.S.C. § 1317*(b)(1). The implementing regulations for the Act prohibit the discharge of wastewater with a pH below 5.0 standard units ("s.u.")[1] into publicly owned sewer systems. *40 C.F.R.*

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[1] The term pH stands for a measure of acidity and alkalinity on a logarithmic scale from 0 to 14, with 7.0 representing neutrality,

§ 403.5(b)(2). Any person who "knowingly" violates these standards is subject to felony prosecution. 33 U.S.C. §1319(c)(2)(A).

Riverdale Mills's state permit for discharging its waste into the public sewer states that Riverdale Mills will ensure that the wastewater falls within acceptable limits by combining the two streams inside the plant so that the caustic water neutralizes the acidic water, and then further neutralizing the waste by adding a caustic soda. Following this pretreatment, on the design in the permit, the now-combined wastewaters would flow intermittently through an effluent pipe to a manhole outside the building on Riverdale Street (Manhole # 1), where it joins a sewer pipe. The discharge then would flow through that sewer pipe approximately 100 yards to a second manhole (Manhole # 2), where the pipe joins the public sewer line.

Acting on an anonymous tip that this pretreatment system was not in operation, two EPA civil inspectors went to Riverdale Mills for an unannounced inspection on October 21, 1997. The district court determined that Knott consented to the inspection, but determined on disputed facts that his consent was qualified by the express condition that the EPA inspectors be accompanied by Riverdale Mills representatives during the entire course of their inspection. Knott then accompanied the inspectors to Manhole # 1, where they took two initial samples (neither below pH 5.0 s.u.) and observed only an intermittent discharge. Because of the intermittent nature of the discharge flow, the inspectors then allegedly

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numbers below 7 representing increasing degrees of acidity, and numbers above 7 representing increasing alkalinity. Each whole number step away from 7 represents a ten-fold increase in acidity or alkalinity, such that a sample with a pH of 4.0 s.u. is ten times more acidic than a sample with a pH of 5.0 s.u., and so forth.

informed Knott that they would have to conduct periodic sampling throughout the day. The group then embarked on a tour of the facility, during which the EPA inspectors discovered that, contrary to Knott's alleged statement that morning, the wastewater treatment facility at Riverdale Mills was not in operation. Apparently, the two wastewater streams were not being mixed in the treatment facility as intended because a valve was turned to the wrong position, and also the tank where caustic soda was to be added to the wastewater was being bypassed.

In the early afternoon, the inspectors returned to Manhole # 1, on the street in front of the plant and in the plain view of Riverdale Mills employees. There they took a series of samples, and those additional samples yielded pH readings ranging from 2.19 to 7.48 s.u., with thirteen of the fourteen samples showing extremely low pH readings (between 2.19 and 2.59 s.u.).[2] The district court determined that the EPA inspectors were not accompanied by a Riverdale Mills representative for this sampling. The inspectors then returned to the plant and a Riverdale Mills employee completed their tour of the facilities. The EPA inspectors also gave a split sample from one of their afternoon samples to the employee, who signed the chain of custody form for it. At the EPA's closing conference with Knott, they discussed the low pH discharges, and Knott informed the EPA inspectors that he owned Riverdale Street and he claimed ownership of the sewer line under the street.

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[2] Riverdale Mills disputes the log of these samples, arguing that the readings were actually in the "7" range, but that the number "7" originally written in the log was subsequently altered to appear to be a "2."

After leaving the plant, the EPA inspectors went to Manhole # 2. This is where the "private" sewer line joined the municipal line, according to Knott's statement at the meeting. There the inspectors noted a second residential sewer line also joined at the manhole, seven feet below the Riverdale Mills line. Accordingly, they took three different samples at this site. One was from the discharge of the residential line, which the EPA says yielded a pH of approximately 7 s.u. One was from water standing in a trough at the manhole, which the EPA says yielded a pH around 7 s.u. The last one was from the discharge flowing from the Riverdale Mills line, which the EPA says yielded a pH of around 4 s.u. In their field log, the number "4" for this final measurement appears to be written over a "7." (The district court later concluded that the recorded entry for that sample had been altered from its actual reading of 7 s.u.)

Based on this information, the EPA criminal division obtained a federal search warrant and conducted a second inspection on November 7, 1997. A large number of samples were taken at Manhole # 1. Most had a pH below 5.0 s.u. and the samples worsened -- that is, became even more acidic -- as the day progressed. EPA agents also took seven samples in the morning at Manhole # 2, and all had pH readings around 5.0 or 6.0 s.u. Again, the agents observed that the required pretreatment system at the Riverdale Mills plant was largely not operational; although on that day the two wastewater streams were mixing in the plant, the process adding caustic soda was still being bypassed. Plant employees told the EPA that the pretreatment system had not been in operation since sometime in the spring of 1997, and that Knott was aware that wastewater was being discharged without pretreatment.

In July 1998, the EPA executed a second search warrant to measure the effects of groundwater infiltration between

Manhole # 1 and Manhole # 2. This was done in response to Knott's claim that he owned the intervening sewer line and that by the time the wastewater reached the public sewer at Manhole # 2, groundwater infiltration inevitably brought it within the legal limit. The EPA's expert concluded that even making assumptions favorable to Knott, any wastewater with a pH below 3.0 s.u. at the first manhole would reach the sewer line at the second manhole with a pH below 5.0 s.u.

On August 12, 1998, a federal grand jury indicted Knott and Riverdale Mills on two counts of violating the Clean Water Act by knowingly discharging industrial wastewater with a pH below 5.0 s.u. into a publicly owned treatment works on October 21 and November 7, 1997. Following the indictment, both the U.S. Attorney's office and the regional EPA issued standard press releases announcing the indictment and its allegations.

On October 14, 1998, Knott and Riverdale Mills moved to suppress evidence from the afternoon sampling on October 21, 1997 as the result of an unlawful search, and also to suppress the sampling obtained through the November 7 search warrant, as the fruit of the October 21 sampling. On February 16, 1999, the district court suppressed the sampling results from the afternoon of October 21, 1997, finding that the EPA inspectors exceeded the scope of Knott's consent when they sampled the wastewater stream without a Riverdale Mills representative present. However, the district court declined to suppress the evidence obtained on November 7, reasoning that even though the basis of the warrant was in part the October 21 afternoon sampling, the agents acted in good faith executing the warrant.

The government sought leave of court to dismiss the indictment without prejudice on April 23, 1999, because in the course of preparing for trial, it determined that the suppression had substantially weakened its case and raised a

question as to whether it could make a sufficiently compelling case to the jury to meet its burden of proof on the remaining evidence. Leave of the court to dismiss the indictment without prejudice was granted by the district court on May 6, 1999.

Following the dismissal of the indictment, Knott and Riverdale Mills filed a motion to recover reasonable attorneys' fees under the Hyde Amendment. The district court awarded attorneys' fees to Riverdale Mills as a prevailing party[3] because, in the view of the court, while the prosecution was neither frivolous nor in bad faith, it was "clearly vexatious" within the meaning of the Hyde Amendment. *United States v. Knott, 106 F. Supp. 2d 174, 180 (D. Mass. 2000).* The district court, relying in part on the Eleventh Circuit's decision in *United States v. Gilbert, 198 F.3d 1293 (11th Cir. 1999),* held that a defendant seeking fees under the Hyde Amendment must show that the government's legal position was asserted "in bad faith or without any foundation or basis for belief that it might prevail" and thus amounted to "prosecutorial misconduct." [4] See *106 F. Supp. 2d at 179* (quoting *Gilbert, 198 F.3d at 1303-04).* The district court rested its conclusion that the

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[3] In the district court, the government contested whether the defendants were properly considered "prevailing parties" within the meaning of the Hyde Amendment, as the indictment was dismissed without prejudice.

[4] The district court also cited to two different definitions of "vexatious" from Black's Law Dictionary: one defining vexatious as "without reasonable or probable cause," the other defining a "vexatious" charge as one that is calculated to "harass, disquiet, or annoy." *106 F. Supp. 2d at 179* (citing Black's Law Dictionary 1565 (6th ed. 1990)).

prosecution here was "vexatious" on the court's belief that the government did not have "any credible evidence" to support the accusation that the defendants discharged waste with a pH below 5.0 s.u. into the public sewer. Id. To the contrary, the court concluded, the samples taken at the second manhole, "the point of discharge into the public sewer," showed that Riverdale Mills "was not in violation of the Clean Water Act." Id. The district court did not, however, find that the agents or prosecutors in this case acted maliciously, or with any particular personal motive to vex the defendants. The court rested instead simply on the purported absence of credible evidence, though it also discussed some alleged misconduct in the collection of samples and the conduct of searches. Accordingly, the court awarded fees in the sum of $ 68,726.00 to the company against the United States under the *Hyde Amendment. 106 F. Supp. 2d at 181.* The court denied fees to Knott because his net worth exceeded $ 2 million, reasoning that the limitations of *28 U.S.C. § 2412*(d) apply to the Hyde Amendment. *Id. at 178.*

The government appeals this fee award, arguing (1) that the court applied the wrong legal standard in defining vexatiousness, as it did not find any malice or intent to harass in the prosecution, but rather found only that the prosecution lacked foundation; (2) that the district court's conclusion that the prosecution lacked foundation was in clear error, as the government had ample evidence to prove the violations prior to the suppression ruling, and indeed it could have pursued the charges even on the evidence that remained after the court's suppression order; and (3) that the court erred in identifying certain isolated acts of government agents as evidence of vexatiousness.

Knott, in turn, challenges the district court's ruling against him, arguing that he could seek an award under the Hyde Amendment pursuant to the procedures and limitations of *28*

U.S.C. § 2412(b) instead of § 2412(d), thereby eliminating the net worth limitation and entitling him to recovery.

II.

We initially determine the legal issue raised in Knott's cross-appeal from the district court's dismissal of his claim for fees under the Hyde Amendment on the ground that his net worth renders him ineligible for an award of fees. At issue is whether the Hyde Amendment's incorporation of the "procedures and limitations" of the Equal Access to Justice Act, *28 U.S.C. § 2412,* encompasses all of the avenues to relief contained in § 2412, or simply refers to the procedures and limitations imposed in § 2412(d).

The Hyde Amendment provides that fee awards "shall be granted pursuant to the procedures and limitations (but not the burden of proof) provided for an award under section 2412 of [the Equal Access to Justice Act] ...." 111 Stat. at 2519. Section 2412 of the EAJA, however, provides for the award of attorneys' fees in two separate subsections, each containing different procedures and limitations.

EAJA Subsection 2412(b) provides for the recovery of attorneys' fees against the United States, not by supplying an independent basis for recovering fees, but instead by subjecting the United States to other existing provisions which allow recovery of fees against private parties in the civil context. It provides that "a court may award reasonable fees and expenses of attorneys, in addition to [costs], to the prevailing party in any civil action brought by or against the United States .... The United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award." *28 U.S.C. § 2412*(b). Awards under § 2412(b) are limited, of course, by the standards of the common law or the terms of

the incorporated statutory provision upon which the award is based, just as an award against a private party would be, but § 2412(b) itself does not otherwise provide procedures for or limitations upon fee awards under the EAJA.

EAJA Subsection 2412(d) supplies an additional substantive basis for a civil party to recover fees against the United States. It provides that "a court shall award [fees and expenses] to a prevailing party ... unless the court finds that the position of the United States was substantially justified." *28 U.S.C. § 2412*(d)(1)(A). Unlike § 2412(b), § 2412(d) itself subjects fee awards to certain procedures and limitations. An individual may not recover fees under subsection (d) if his individual net worth exceeds $ 2 million (nor can a corporation, if its net worth exceeds $ 7 million and it has more than 500 employees). See *28 U.S.C. §2412*(d)(2)(B). In addition, subsection (d) caps the hourly rate at which an award may be granted at $ 125. *28 U.S.C. §2412*(d)(2)(A). Knott concedes that he would be ineligible under the $ 2 million net worth limitation, but contests its applicability.

The district court rejected Knott's argument that he is not subject to the net worth limitation or the cap on hourly rates because defendants may elect to proceed under either *28 U.S.C. § 2412*(b) or (d). The district court concluded that the procedures and limitations of EAJA § 2412(d) applied to applications for fees under the Hyde Amendment for two main reasons. First, the district court reasoned that allowing defendants to elect to proceed under § 2412(b) would effectively read the clause "under the procedures and limitations of section 2412" out of the Hyde Amendment. Second, the district court, confronted with two interpretations of the statute, construed it narrowly in accord with the principle that waivers of sovereign immunity are to be construed narrowly. See *106 F. Supp. 2d at 177-78.*

The district court was correct to require fee applicants to meet the eligibility requirements of EAJA § 2412(d). The Hyde Amendment expressly adopts "procedures and limitations" from the EAJA. We hold that this reference incorporates the "procedures and limitations" contained in EAJA § 2412(d). Accord *United States v Ranger Elec. Communications, Inc., 210 F.3d 627, 632-33 (6th Cir. 2000).*

Knott's suggested reading of the Hyde Amendment undercuts the language of the provision and policy concerns underlying the incorporation of these procedures and limitations. If defendants could elect to proceed under §2412(b), as Knott argues, it is not clear that the Hyde Amendment's incorporation of "procedures and limitations" from the EAJA would have any practical effect. In order to give meaningful effect to the plain language of the Hyde Amendment, then, the incorporation is best read to refer to the limitations contained in EAJA § 2412(d).

This is particularly so given that, unlike EAJA § 2412(d), EAJA § 2412(b) does not supply an independent substantive ground upon which to recover fees, instead directing applicants to other bases providing a remedy of attorneys' fees, including their procedures and limitations, and simply subjecting the United States to the same obligations regarding attorneys' fees as private parties. Because EAJA § 2412(b) does not provide a complete and independent ground for a fee award but instead affords relief only by reference to otherwise existing avenues to recover fees, it would create a peculiar circularity to allow a defendant relying on the Hyde Amendment as the substantive basis of a request for attorneys' fees to elect to proceed through EAJA § 2412(b) in order to avoid the limitations imposed in EAJA § 2412(d), given that the Hyde Amendment itself incorporates the procedures and limitations of the EAJA. See *Ranger Elec. Communications, 210 F.3d at 633.*

Finally, the fact that the Hyde Amendment waives sovereign immunity and the policy concerns regarding the impact of awarding fees in the criminal context, as reflected in the legislative history of the Amendment, both counsel in favor of narrowly construing the Amendment, and therefore incorporating the procedures and limitations of EAJA §2412(d). In order to make best sense of the language of the statute, then, we conclude that the procedures and limitations referenced are those laid out in § 2412(d).

III.

We next address the government's appeal from the award of attorneys' fees in favor of Riverdale Mills.

A. The Hyde Amendment Legal Standard

Congress enacted the Hyde Amendment in 1997 in response to perceived instances of prosecutorial abuse by the United States. See *United States v. Gilbert, 198 F.3d 1293, 1299-1303 (11th Cir. 1999)* (reviewing legislative history). The purpose of the Amendment was to allow defendants to recover attorney's fees and costs in cases of prosecutorial misconduct. Id. The provision provides that a district court may award attorneys' fees and other costs to a prevailing defendant "where the court finds that the position of the United States was vexatious, frivolous, or in bad faith, unless the court finds that special circumstances make such an award unjust. Such awards shall be granted pursuant to the procedures and limitations (but not the burden of proof) provided for an award under [the Equal Access to Justice Act] ...." 111 Stat. at 2519.

The Hyde Amendment was patterned after the Equal Access to Justice Act, *28 U.S.C. § 2412,* which provides for an award of attorney's fees against the United States in civil cases. The Hyde Amendment differs in at least two important

respects. First, it raises the standard for awarding fees. The Hyde Amendment allows recovery by prevailing criminal defendants only where the position of the United States was "vexatious, frivolous, or in bad faith," in contrast to the EAJA, which authorizes an award to a prevailing civil party in any case where the position of the United States was not "substantially justified," see *28 U.S.C. § 2412*(d)(1)(A). Indeed, the legislative history of the Hyde Amendment shows that in drafting the provision, Congress considered and rejected as too easily met both the "not substantially justified" standard of the EAJA and a standard (modeled after the Firearms Owners' Protection Act of 1986, see *18 U.S.C. §924*(d)(2)(B)) which would have awarded fees, inter alia, where the United States' position was "without foundation." See *Gilbert, 198 F.3d at 1301-02*. Second, unlike the EAJA, the Hyde Amendment places the burden of proof on the defendant to demonstrate that the government's position was "vexatious," "frivolous," or "in bad faith." See id.

In construing and applying statutory terms, we begin by examining the language of the statute itself. See, e.g., *Bailey v. United States, 516 U.S. 137, 144, 133 L. Ed. 2d 472, 116 S. Ct. 501 (1995)*. The words "vexatious, frivolous, or in bad faith" are not defined in the statute. In such circumstances, courts typically read statutory terms to convey their ordinary meaning, see, e.g., *Gilbert, 198 F.3d at 1298* (citing *Chapman v. United States, 500 U.S. 453, 462, 114 L. Ed. 2d 524, 111 S. Ct. 1919 (1991))*, including as reflected in dictionary definitions, see, e.g., *Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep't of Health & Human Servs., U.S. 149 L. Ed. 2d 855, 121 S. Ct. 1835, 1839 (2001)* (relying on definition of "prevailing party" in Black's Law Dictionary); *121 S. Ct. at 1846* (Scalia, J., concurring). Black's Law Dictionary defines the term "vexatious" -- the term at issue in this case -- to mean "without reasonable or probable cause or excuse; harassing; annoying." Black's Law

Dictionary 1559 (7th ed. 1999). It further defines "vexatious suit" to mean a "lawsuit instituted maliciously and without good cause." Id. Standard English-language dictionaries give the term similar meaning. See, e.g., Webster's Third New Int'l Dictionary 2548 (3d ed. 1961) (defining "vexatious" to mean, inter alia, "lacking justification and intended to harass"); 19 Oxford English Dictionary 596 (2d ed. 1989) (defining "vexatious" for legal purposes as "instituted without sufficient grounds for the purpose of causing trouble or annoyance to the defendant").

Circuit courts construing the Hyde Amendment have varied in interpreting the term "vexatious." The Gilbert court, for instance, relies on a definition of "vexatious" as "without reasonable or probable cause or excuse." See *198 F.3d at 1298-99;* accord *In re 1997 Grand Jury, 215 F.3d 430, 436 (4th Cir. 2000).* By contrast, the Ninth Circuit, in *United States v. Sherburne, 249 F.3d 1121 (9th Cir. 2001),* held that a finding of vexatiousness under the Hyde Amendment requires both a determination that the prosecution was "objectively deficient" in that it "lacked merit" and a finding that the prosecution possessed "an element of maliciousness, or an intent to harass." *Id. at 1126.* The Sherburne court referred to the finding that the suit lacked merit as an "objective" component of vexatiousness and the finding that the suit was prosecuted with some subjective malice or intent to harass or annoy as a "subjective" component. *Id. at 1127.* Other courts have utilized a standard more amenable to the party seeking fees. See *United States v. Holland, 34 F. Supp. 2d 346 (E.D. Va. 1999)* (framing the inquiry as "whether a reasonable prosecutor should have concluded that the applicable law and the available evidence were insufficient to prove the defendants' guilt beyond a reasonable doubt, and, if so, was the continuation of the prosecution vexatious").

We hold that a determination that a prosecution was "vexatious" for the purposes of the Hyde Amendment requires both a showing that the criminal case was objectively deficient, in that it lacked either legal merit or factual foundation, and a showing that the government's conduct, when viewed objectively, manifests maliciousness or an intent to harass or annoy. Such a reading best comports with the language employed by Congress in the Amendment. This is especially so when considered in the context of Congress's concern to protect against prosecutorial misconduct while at the same time providing a sufficiently stringent standard to avoid undermining appropriate prosecutorial zeal.

The standard implied by the district court and advanced by the defendants -- that "vexatious" conduct can be shown simply by showing that the charges brought by the United States were ultimately determined to be without either evidentiary or legal foundation -- does not adequately account for Congress's efforts to limit Hyde Amendment awards to cases of affirmative prosecutorial misconduct rather than simply any prosecution which failed. As the Gilbert court notes, "in prosecuting crime, government attorneys are entitled to be zealous advocates of the law on behalf of their client, the people of the United States. While a prosecutor is not at liberty to strike foul blows, he may strike hard ones, and 'he may prosecute with earnestness and vigor -- indeed, he should do so.'" *198 F.3d at 1303* (quoting *Berger v. United States, 295 U.S. 78, 88, 79 L. Ed. 1314, 55 S. Ct. 629 (1935)).*

The structure of the statute also militates against resting vexatiousness simply upon a finding that the prosecution lacked "any credible evidence." It may be that if the government pursued a position so obviously wrong that no reasonable prosecutor could have supported it, the defendant would be entitled to a fee award under the Hyde Amendment. Without a finding of bad faith or improper motive, however,

if the government pursues a prosecution without any foundation or basis for belief that it might prevail, such a prosecution would more appropriately be deemed "frivolous" than "vexatious." Reading "vexatious" to encompass such a case would render it synonymous with "frivolous," thus improperly rendering the term mere surplusage.

Finally, awarding fees upon a determination that the prosecution lacked sufficient evidence does not accord with the legislative history of the Hyde Amendment. In rejecting the "not substantially justified" formulation of the EAJA and the "without foundation" formulation of the Firearms Act, Congress sought narrow language "meant to sanction and deter prosecutorial misconduct, not prosecutorial zealousness per se." *Gilbert, 198 F.3d at 1304.*[5] The Hyde Amendment's shifting of the burden of proof also reflects this concern. The alternative construction urged by the defendants would burden the United States with the threat of a large number of fee applications arising from circumstances quite different than those against which Congress sought to protect.

To make best sense of the statutory language and in light of the purposes embodied in the Hyde Amendment, we conclude that something more than simply an inadequate evidentiary foundation is required to demonstrate that the prosecution was "vexatious" within the meaning of the Hyde Amendment -- that is, some finding of malice or improper

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[5] Indeed, though the Gilbert court provides a definition for "vexatious" that does not explicitly require improper motive, it assesses the government's conduct in light of all three elements that would support a Hyde Amendment award simultaneously, so it is not entirely clear how the court would apply "vexatious" in isolation. The court does note that the Hyde Amendment was "targeted at prosecutorial misconduct, not prosecutorial mistake." *198 F.3d at 1304.*

motivation is required.[6] After all, there is an alternate ground in the statute to award fees where an action is frivolous. In requiring that the government's conduct manifest malice or an intent to harass or annoy in order to be "vexatious," however, we do not intend an inquiry into subjective intent, and we reject the approach of Sherburne to the extent it suggests that such attention to subjective motivations is required. Rather, the issue is whether the government's conduct, when viewed objectively, manifests, or is tantamount to, malice or an intent to harass or annoy. Cf. *Braley v. Campbell, 832 F.2d 1504, 1512 (10th Cir. 1987)* (en banc) (rejecting subjective intent standard "as virtually impossible to apply" for fee awards under *28 U.S.C. § 1927).*[7]

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[6] In requiring this element of malice or improper motive, we recognize that our construction of "vexatious" here differs from the way the term is construed in the Title VII context. See *Tang v. Rhode Island Dep't of Elderly Affairs, 163 F.3d 7, 13 (1st Cir. 1998)* ("A district court may in its discretion award attorney's fees to a prevailing defendant ... upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith.") (quoting *Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 421, 54 L. Ed. 2d 648, 98 S. Ct. 694 (1978)).* Like the Sherburne court, we conclude that the context differs in material ways, most importantly in that, because the Hyde Amendment addresses fees in the criminal context, Congress enacted it against a background in which courts have no inherent power to award fees. See *Sherburne, 249 F.3d at 1127 n.5.*

[7] The Supreme Court has expressly rejected an inquiry into subjective intent in deciding questions of official immunity in the law enforcement context, replacing it with an objective inquiry into the legal reasonableness of the official action. See *Harlow v. Fitzgerald, 457 U.S. 800, 815-20, 73 L. Ed. 2d 396, 102 S. Ct. 2727 (1982);* see also *Whren v. United States, 517 U.S. 806, 811-13, 135*

Defendants also point to common law awards of attorneys' fees, where "vexatious" litigation need not always require subjective bad faith in order to justify a fee award. See *Local 285 v. Nonotuck Res. Assocs., 64 F.3d 735, 737-38 (1st Cir. 1995)* (holding that subjective bad faith is not a prerequisite to a fee award under the common law); but cf. *Rivera Morales v. Benitez de Rexach, 541 F.2d 882 (1st Cir. 1976)* (overturning common law fee award where there was no finding that defendants acted in bad faith). This reliance on occasional cases from a civil context which did not require subjective bad faith ignores the peculiar concern, unique to the criminal context, that the drafters of the Hyde Amendment had to avoid chilling legitimate prosecutions. In addition, common law fee awards involve a full-blown equitable analysis and depend on the discretion of the court, a requirement overlooked in the attempt to draw a parallel to the Hyde Amendment awards at issue here.

B. Evidence of Malice or Intent to Harass or Annoy

The district court here did not make any express findings that the government's actions in this case manifested malice or an intent to harass or annoy, resting its fee award instead on the purported absence of credible evidence to support the charges. Under the standard articulated here, the absence of

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L. Ed. 2d 89, 116 S. Ct. 1769 (1996) (rejecting subjective intent test in Fourth Amendment context). It would be odd if against this background Congress intended an inquiry into the subjective motivations of prosecutors under the vexatiousness standard of the Hyde Amendment. We do not address whether the "bad faith" test requires a subjective inquiry.

objective evidence of such improper motive renders the fee award inappropriate. The district court did, however, identify and criticize isolated conduct of the EPA and prosecution, and defendants suggest that this conduct suffices to prove vexatiousness and support the award in any event.

Defendants point to an array of government conduct both before the indictment and during litigation in an effort to demonstrate that the prosecution was indeed vexatious. As defendants contend, it is permissible for courts to consider the conduct of the investigation in order to provide a context in which to assess whether a prosecution was "vexatious" within the terms of the Hyde Amendment. However, the alleged conduct in this case, whether taken independently or collectively, either lacks sufficient record support or fails to rise to the level of conduct required to find vexatiousness. Therefore this tacit argument that the government proceeded with improper purposes does not succeed. We address the contentions in turn.

First, defendants point to the district court's conclusion that some samples taken during the October 21 inspection of the site exceeded the scope of the permission given by Knott. The validity of the order suppressing the afternoon samples is not before us, but the issue was close and the ultimate decision to suppress the evidence was by no means a foregone conclusion. In any event, the mere fact that EPA inspectors took samples exceeding the scope of permission hardly warrants an inference that their conduct was vexatious; their conduct could just as well have rested on an honest mistake of fact or misapprehension of the authority they had been granted, a possibility suggested by the fact that they subsequently provided a split sample from that afternoon to the defendants.

Second, defendants seize on the district court's determination that there was "credible evidence" that the

annotation of some of the sampling results had been altered; they contend that such alteration is evidence of governmental abuse. As an initial matter, there is little evidence in the record that any of the annotations were altered apart from the 4 pH reading at Manhole # 2 on October 21. Putting aside the question of support in the record, even assuming dubitante that some of the sample readings were deliberately and erroneously re-recorded, that alone would not necessarily be enough to establish vexatious prosecution where properly recorded samples showed a violation. But here the district court did not render any findings as to the reasons why annotations were changed, just that there was "credible evidence" that they may have been. The annotations in the log may have been written over for any number of reasons, some as benign as the correction of a mistake. Nor is there any record evidence suggesting any improper conduct in recording the sample results. Even assuming that the fact of some alterations is supported in the record, since the existence of the purported alterations is equally open to benign and malign interpretations on the present record, it hardly provides sufficient evidence of vexatious conduct.

Third, defendants charge that the EPA agents continued to take readings at Manhole # 1 despite their awareness of Knott's claim to ownership of the sewer line under Riverdale Street, and subsequently prosecuted them largely on the basis of pH readings taken at Manhole # 1. This charge does not support any determination of vexatiousness. The question of ownership of the sewer under Riverdale Street, as discussed further below, was open to reasonable dispute, and the EPA was entitled to pursue charges based on discharges at the first manhole so long as it had a legal argument that the public sewer began there. More importantly, as discussed below, the pH level of discharges at Manhole # 1 provides relevant evidence of violations even if the public sewer begins at Manhole # 2, regardless of ownership.

Next, defendants contend that the fact that the EPA and the U.S. Attorney issued press releases following the indictment reveals malice. The press releases simply state that the defendants were indicted and describe the charges for which the indictments were issued. Such standard press releases do not suggest any intent to vex.

Defendants also contend that vexatiousness is shown by the government's failure to produce automatically some evidence the court deemed exculpatory, where such production is required by a local court rule. The court deemed a certain log to be exculpatory because it showed a series of pH readings at Manhole # 2 above 5.0 s.u. on the morning of November 7. While the government is correct that the existence of some discharges within the legal limit is not clearly exculpatory, the better practice would have been for the government to produce the logs as part of automatic discovery given the local rule. However, in this case, the logs were turned over in a timely fashion upon a discovery request from the defendants, and the short delay did not prejudice the defendants. In these circumstances, given that the exculpatory nature of the evidence is questionable, the failure to produce the evidence automatically does not amount to vexatious behavior within the meaning of the Hyde Amendment.

Defendants also claim that the government unduly delayed dismissing the case following the district court's suppression order. The district court ruled on the suppression motion on February 16, 1999; the government moved to dismiss the case on April 23, 1999. Such a delay does not suggest vexatious conduct. The government is entitled to weigh carefully whether or not to appeal the exclusion of evidence and to assess carefully whether or not to continue the case in the absence of the excluded evidence. In doing so, the government is engaging in precisely the sort of prosecutorial decision making that is its business, and

assessing the strength of the remaining case requires some consideration. Indeed, the decision here to move for a dismissal of the indictment was by no means preordained by the suppression order, as the government had evidence with which it might have pressed its case even without the excluded evidence. We would not want the Hyde Amendment to deter the prosecution from exercising its discretion to dismiss cases where it concludes that prosecution is no longer warranted.

Finally, defendants contend that the manner in which the EPA executed the November 7 search warrant evinces vexatiousness. The district court stated that the EPA brought "a virtual 'SWAT team'" to conduct the search and that the agents involved engaged in "humiliating" conduct. (The search involved the presence of 21 agents, some armed, who interviewed and videotaped employees.) *106 F. Supp. 2d at 180.* However, any conclusion that the EPA agents engaged in unwarranted behavior in executing the search is not supported by the record. The affidavits of Knott and Agent Creavin contain conflicting statements regarding the search. But even crediting all of Knott's sworn allegations regarding the search, the conduct of the search does not amount to vexatious conduct. Knott alleges that the EPA brought 21 agents, some armed, that they engaged in "outrageous and disruptive" behavior in conducting the search, and that some of the seized documents were outside the scope of the search warrant. In an unsworn letter to the assistant U.S. attorney, Knott supplemented these charges, contending that the EPA did not show him the search warrant until the premises were secured, that they interviewed Riverdale Mills employees both during the search and later in the day at their homes, that these interviews were videotaped, and that in one instance the agent holding the video camera held it too close to the face of the interviewee until another agent asked him to back up.

None of these contentions -- apart from the conclusory characterization of the conduct as "outrageous" -- set forth conduct that is properly deemed vexatious, at least absent more specific facts. There is nothing untoward about criminal investigative agents of the EPA wearing holstered firearms while in the field, nor about securing premises before showing the search warrant. That the EPA wanted to interview Riverdale Mills employees is also hardly surprising, as is the fact that the EPA wanted to record the interviews. It was, after all, a tip from an employee which started the whole investigation, and it appears that the employees knew the pretreatment system was not operating as required, and that Knott was aware of this. The record does not reflect any misconduct in the manner in which the interviews were carried out, or even provide any reason to suspect it, and the defendants opted not to provide affidavits from the interviewed employees. On the record before the court, there was no basis to find that the EPA engaged in such unwarranted conduct in executing the warrant as to render its behavior vexatious within the meaning of the Hyde Amendment.[8]

The record simply does not reflect the sort of malice or prosecutorial misconduct toward which the Hyde Amendment was directed. While the government might have handled itself better in some of these instances, that does not render its conduct "vexatious." Rather, an award of fees for "vexatious" prosecution under the Hyde Amendment requires some evidence upon which a reasonable observer can conclude that the prosecution was based in malice or an intent to harass or annoy. The district court erred as a matter of law in applying

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[8] We bypass the question of whether one vexatious raid would render the pursuit of a criminal case "vexatious."

a legal standard that would award fees under the Hyde Amendment in any case where the prosecution is ultimately deemed to have been without sufficient foundation.

C. Evidence to Support Prosecution

Of equal importance is that the district court's finding that there was no "credible evidence" upon which to pursue charges was clear error. The government had ample reason to investigate and pursue charges against the defendants, and indeed still had adequate cause to prosecute even after the suppression of evidence. Thus an award of attorneys' fees under the Hyde Amendment is clearly not warranted, given the failure to meet the first part of the test of vexatiousness: that the government's suit lacked either legal merit or factual foundation.

The EPA had ample reason to initiate an investigation of Knott and Riverdale Mills. In the summer of 1997, the EPA received an anonymous letter from an employee of the company indicating that the company was not complying with the pretreatment requirements set out in its agreement with the state, as embodied in its state permit to discharge industrial wastewater into the public sewer. Upon arriving to investigate this allegation on October 21, the EPA inspectors observed that, contrary to Knott's alleged representation that morning, the pretreatment system at the plant was not in operation. Indeed, although at the closing conference on the afternoon of October 21, the EPA inspectors discussed with Knott the fact that the pretreatment system was not operational and that low pH discharges into the public sewer were occurring as a result, when the EPA returned to conduct the November 7 search, the pretreatment system was still not operating properly. Interviews with Riverdale Mills employees that day confirmed that the pretreatment system had been out of operation for several months and that Knott

was aware that it was not functioning. Defendants do not contest the fact that the pretreatment system was not in operation on either day but rather resort to arguments that other processes would dilute the wastewater before it reached the public sewer.

In addition, there was considerable direct evidence of a Clean Water Act violation. As defendants acknowledge, a single knowing discharge of wastewater with pH below 5.0 s.u. into the public sewer is sufficient to prosecute as a Clean Water Act violation. Here, at the time the government sought the indictment, it had over fifty samples that it considered direct evidence of discharges below pH 5.0 s.u. For the first count, covering October 21, the EPA had 13 samples from Manhole # 1 below pH 3.0 s.u. and one disputed sample at Manhole # 2 at pH around 4.0 s.u. For the second count, covering November 7, the EPA had over 40 samples below pH 5.0 s.u., including three below pH 3.0 s.u., all taken at Manhole # 1.

The district court discounted much of this evidence as immaterial, giving two reasons: first, much of it resulted from samples taken at Manhole # 1; and second, much of it was later suppressed. The decision not to consider the government's evidence taken at Manhole # 1 is flawed, in two respects. First, at the time the government sought the indictment, the ownership of the street where Manhole # 1 is located remained in dispute, and the government had a good faith legal argument that the relevant point of discharge into the public sewers was the first manhole. Therefore it was entitled to pursue charges based on discharges at Manhole #1.

More importantly, the district court's decision to disregard the sampling results at Manhole # 1 misapprehends or ignores the relationship between sampling data collected at the first manhole and the acidity of Riverdale Mills's discharges into

the public sewer, even if the public sewer begins only at the second manhole. The prosecution had ample evidence that the defendant discharged highly acidic water at the first manhole on both days. Even if the relevant public sewer does not begin until the second manhole 100 yards away, these samples still provide evidence that the water ultimately discharged by the defendants at the second manhole had a highly acidic content. That is particularly so in light of the EPA expert's conclusions. The EPA was not required to accept Knott's lay theory, not even advanced on appeal, that the slope of the pipes over that 100 yard distance ensured that pulses of highly acidic water would inevitably be neutralized by mixing with pulses of highly caustic water before they both hit Manhole # 2. Nor was the EPA required to accept the later-advanced theory that the pipes were subject to so much groundwater infiltration that the groundwater would dilute the effluent down to an acceptable level over the short distance of 100 yards. By overlooking the bearing which the pH readings at the first manhole have on the acidity of discharges at the second, the district court committed clear error.

The defendants argue that the district court is free to accept or reject the conclusions of the EPA expert who stated that the groundwater infiltration rate would not sufficiently dilute highly acidic water within the 100 yard span of the sewer line under Riverdale Street. While this assertion may be true as to the ultimate factual determination, it misses the issue at stake in the application for fees under the Hyde Amendment, which is whether the EPA was vexatious in deciding to proceed in its prosecution. Even if the court or jury did not ultimately credit the EPA expert's conclusions, there is no evidence in the record to suggest that that expert was so wantonly and obviously wrong that the EPA was not entitled to rely upon his determinations in proceeding. Indeed his determination may well be correct. For these reasons, the evidence of samples below pH 3.0 s.u. at Manhole # 1

remains credible evidence upon which the EPA was entitled to pursue charges.

Second, in concluding that the prosecution lacked "any credible evidence," the district court erroneously discounted all the evidence that it had suppressed. For Hyde Amendment purposes, however, the court must assess the basis for pursuing charges from the perspective of the government at the time. Instead, the district court required undue prescience on the part of the government. The government was entitled, ab initio, to rely on the evidence subsequently suppressed in making its prosecutorial decision, provided it could articulate, in good faith, a reasonable position on the suppression issue.

There were genuine factual disputes regarding what happened on October 21, and the conditions which were imposed upon the consent to the EPA inspection were, at the very least, ambiguous. The government was entitled to rely on its evidence so long as it had a good-faith basis for contending that the evidence was admissible. The suppression issue presented here was not so clear cut as to deprive the prosecution of a reasonable basis for believing that its evidence was admissible. An interpretation of the Hyde Amendment which effectively requires the government precisely to anticipate later evidentiary rulings, where reasonable grounds for disagreement exist, is untenable in light of the language and purposes of the Hyde Amendment.

Indeed, even after the suppression ruling, there remained an adequate evidentiary foundation for the prosecution, at least as concerns the second count. There were three readings below pH 3.0 at the first manhole on November 7, each of which, in conjunction with the testimony of the EPA expert, could provide an adequate foundation for a Clean Water Act charge. In addition, the EPA directly observed that the pretreatment system was not in operation on either day, as corroborated through employee interviews. Moreover, there

was evidence the system had not been in operation for some time, which Knott well knew. Although the EPA ultimately concluded that it would not proceed, there remained credible evidence to support a prosecution. Weighing the strength of the evidence and determining whether or not to prosecute are precisely the sorts of choices the government is entitled to make, based on information it has acquired through due diligence.

Since the EPA had a reasonably sufficient evidentiary basis upon which to pursue charges against the defendants, both before and even after the suppression ruling, and absent any finding or reason to believe that the government acted either out of malice or with any intent to harass or annoy, the fee award to Riverdale Mills constituted an abuse of discretion.

IV.

For these reasons, we affirm the denial of fees to Knott, reverse the grant of fees to Riverdale Mills, and remand the application for fees under the Hyde Amendment to the district court for dismissal, with prejudice.

So ordered. No costs are awarded.

United States Court of Appeals
For the First Circuit

No. 00-2238
No. 00-2239

UNITED STATES,
Appellant\Cross - Appellee,

v.

JAMES M. KNOTT, SR.; RIVERDALE MILLS CORP.,
Defendants - Appellees\Cross - Appellants.

JUDGMENT

Entered: July 12, 2001

These causes came on to be heard on appeals from the United States District Court for the District of Massachusetts, and were argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The denial of fees to Knott is affirmed. The grant of fees to Riverdale Mills is reversed and the application for fees under the Hyde Amendment is remanded to the district court for dismissal, with prejudice.

So ordered. No costs are awarded.

By the Court:

JANICE M. O'NEIL

Acting Clerk

**UNITED STATES OF AMERICA,
v. JAMES M. KNOTT, SR., and
RIVERDALE MILLS
CORPORATION, Defendants.**

Criminal Action No. 98-40022-NMG

**UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF MASSACHUSETTS**

***106 F. Supp. 2d 174; 2000 U.S.
Dist. LEXIS 11226; 51 ERC (BNA) 1246***

July 27, 2000, Decided

JUDGES:
Nathaniel M. Gorton, United States District Judge.

OPINION BY:
Nathaniel M. Gorton

OPINION:

MEMORANDUM & ORDER

The motion before this Court arises out of the United States' prosecution of James M. Knott, Sr. ("Knott") and Riverdale Mills Corporation ("RMC") for violating, inter alia, *33 U.S.C. § 1319*(c) (2) (A), the Clean Water Act, by knowingly discharging industrial wastewater with a pH of less than 5.0 standard units ("S.U.") into a publicly-owned wastewater treatment works, i.e. a public sewer.

Knott and RMC allege that the prosecution of those charges by the United States was vexatious, frivolous and in

bad faith and seek to have this Court assess attorneys' fees and expenses incurred in their defense pursuant to Public Law No. 105-109, § 617, 111 Stat. 2440, 2519 (1997) (reprinted in *18 U.S.C. § 3006A*, historical and statutory notes) ("the Hyde Amendment") (Docket No. 51). Defendants also seek leave to conduct discovery to support their Hyde Amendment application (Docket No. 70).

I. Background

RMC manufactures plastic-coated steel wire mesh at a manufacturing facility in Northbridge, Massachusetts. Knott is the controlling shareholder, a director and an officer of RMC and directs its daily operations. RMC's manufacturing process includes two production lines that produce wastewater ultimately discharged into a publicly-owned wastewater treatment works ("the public sewer").

The discharge from the two lines neutralize each other when they are mixed in RMC's wastewater treatment facility and in the pipes that lead from that facility through the plant to a privately owned test pit ("Manhole # 1). From that pit, the wastewater flows through a privately-owned sewer line under Riverdale Street to an outlet in the public sewer at which point there is a manhole ("Manhole # 2") from which samples may be obtained.

On October 21, 1997, officials from the United States Environmental Protection Agency ("EPA"), acting on an anonymous tip from an RMC employee that RMC's wastewater treatment system was not in operation, arrived at the RMC facility to make an unannounced inspection ("the October inspection"). They asked Knott's permission to inspect the facility and Knott acquiesced, on the condition that the EPA officials be accompanied by RMC representatives during the entire course of their inspection.

Knott directed the inspectors to Manhole if # 1 and in the presence of Knott, the inspectors took a sample which yielded a pH of 12.36 S.U. Thereafter, they took a sample yielding a pH of about 2.2 S.U. Discharge of wastewater below pH 5.0 S.U. into a publicly owned sewer system is prohibited under the Clean Water Act ("CWA"). See *40 C.F.R. § 403.5*. The group then embarked on a tour of the facility, during which the EPA officers discovered that the wastewater treatment facility at RMC was not in operation. Apparently, the two wastewater streams were not being mixed in the treatment facility as intended because a valve was turned to the wrong position.

Later that afternoon, outside the presence of RMC personnel, the inspectors reopened Manhole # 1 and took additional samples yielding pH readings ranging from 2.19 S.U. to 7.48 S.U. Because RMC personnel were not present during the afternoon sampling activity, in violation of the prior agreement between Knott and the inspectors, the results of those sample takings were later suppressed by this Court. The EPA also took three samples at Manhole # 2. One was recorded as having a pH lower than the applicable standard (4.0 S.U.) but the defendants offered persuasive evidence that the particular recorded entry for that sample had been altered from its actual reading of 7.0 S.U.

Pursuant to a search warrant, EPA law enforcement officials conducted another inspection of the RMC premises on November 7, 1997 ("the November search"). The underlying affidavit in the application for the search warrant recited, inter alia, the sampling activity from the October inspection as probable cause for the warrant, although that

evidence was later suppressed by this Court. [9] A large number of samples were taken at Manhole # 1 (on private property). Most had a pH below 5.0 S.U. and they worsened as the day progressed. EPA officials took seven samples at Manhole #2 (on public property) and all had pH readings of 5.0 or 6.0 S.U., within the legal limit under the CWA.

A second search warrant (and third inspection) was executed at RMC on July 17, 1998 in response to Knott's intervening claims that (1) because he owned the property between Manhole # 1 and Manhole # 2, the discharge from the RMC plant did not enter the public sewer system until Manhole # 2, located 300 feet beyond Manhole # 1, and (2) the infiltration of groundwater into the sewer lines between Manholes # 1 and # 2 would (and did) dilute the facility's waste and raise the pH levels to within authorized limits by the time it reached Manhole # 2.

On August 12, 1998, a Grand Jury returned an Indictment charging defendants Knott and RMC in two counts with having violated the CWA by knowingly discharging industrial wastewater with a pH of less than 5.0 S.U. into a publicly-owned treatment works. On February 16, 1999, this Court suppressed the sampling results obtained during the afternoon of the October inspection, finding that the EPA exceeded the scope of Knott's consent when it sampled the wastewater stream without a RMC representative present. The government sought leave of court to dismiss the indictment without prejudice on April 23, 1999 because in the

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[1] Although the suppressed evidence from the October inspection provided the basis for subsequent searches, this Court did not suppress evidence obtained in those later searches because it applied the "good faith" exception to the exclusionary rule.

course of preparing for trial, it determined that the evidence was insufficient to sustain its burden of proof. Leave of court to dismiss the indictment without prejudice was granted by this Court on May 6, 1999.

II. Discussion

The Hyde Amendment, the statute under which defendants seek attorneys' fees and expenses, was enacted as part of a 1997 appropriations bill and is found as a statutory note to *18 U.S.C. § 3006A.* It provides as follows:

> During fiscal year 1998 and in any fiscal year thereafter, the court, in any criminal case (other than a case in which the defendant is represented by assigned counsel paid for by the public) pending on or after the date of the enactment of this Act [November 26, 1997], may award to a prevailing party, other than the United States, a reasonable attorney's fee and other litigation expenses, where the court finds that the position of the United States was vexatious, frivolous, or in bad faith, unless the court finds that special circumstances make such an award unjust. Such awards shall be granted pursuant to the procedures and limitations (but not the burden of proof) provided for an award under section 2412 of title 28, United States Code [the Equal Access to Justice Act]....

Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, Pub.L. No. 105-119, § 617, 111 Stat. 2519. The Hyde Amendment was patterned after the Equal Access to Justice Act, ("EAJA"), *28 U.S.C. § 2412,* which provides for an award of attorneys' fees in the civil context.

Defendants argue that their prosecution was vexatious, frivolous and in bad faith because there was never any credible evidence to support the charges of the indictment. The government contends that although its evidence was insufficient to proceed to trial after much of the sampling evidence was lost on a motion to suppress, there was substantial evidence supporting the charges.

A. Prerequisites for an Award Under the Hyde Amendment

1. "Prevailing Party" To recover attorneys' fees under the Hyde Amendment, a criminal defendant first must be a "prevailing party." The Hyde Amendment does not, however, define that term. The government argues that defendants are not "prevailing parties" for Hyde Amendment purposes because the Government voluntarily moved to dismiss the Indictment without prejudice prior to trial. It offers the following reasons why a dismissal without prejudice does not render the defendants "prevailing parties":

(1) there is no bar to its obtaining a new indictment charging exactly the same offenses,

(2) a voluntary dismissal without prejudice may rest on a number of factors, the vast majority of which have nothing to do with the defendants' guilt or innocence or whether the government acted improperly,

(3) the determination that a defendant is a prevailing party based upon a voluntary dismissal may be an incentive for prosecutors not to dismiss cases, and

(4) the Court would have to conduct a "minitrial" for

> each dismissal without prejudice to consider the prosecutor's motives, wasting judicial resources, intruding on the Government's deliberative process and infringing on separation of powers.

Those reasons were rejected by the court in *United States v. Gardner, 23 F. Supp. 2d 1283, 1289-90 (N.D.Okla. 1998),* when it determined that the government's voluntary dismissal of the charges against a defendant made him a "prevailing party" under the Hyde Amendment. Here, this Court finds that defendants are "prevailing parties" for Hyde Amendment purposes.

2. "Procedures and Limitations" of *28 U.S.C. § 2412*

The Hyde Amendment expressly directs that awards of fees :

> shall be granted pursuant to the procedures and limitations (but not the burden of proof) provided for an award under § 2412 of [the EAJA].

Section 2412 of the EAJA provides for the award of attorneys' fees in two separate subsections. Subsection 2412(b) provides that:

> [A] court may award reasonable fees and expenses of attorneys in addition to [costs] to the prevailing party in any civil action brought by or against the United States.... The United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award.

The EAJA does not otherwise restrict awards under

§ 2412(b). Subsection 2412(d) provides that:

> [A] court shall award [fees and expenses] to a prevailing party ... unless the court finds that the position of the United States was substantially justified.

Unlike awards under § 2412(b), awards under § 2412(d) are subject to certain limitations. An individual may not recover attorneys' fees under subsection (d) if his net worth exceeds $ 2,000,000 and a corporation may not recover fees if its net worth exceeds $ 7,000,000 and it had more than 500 employees at the time the action was filed. *28 U.S.C. §2412*(d) (1) (C) (2) (B). In addition, the hourly rate for which an award recipient may recover is capped at $ 125 per hour. *28 U.S.C. §2412*(d) (1) (C) (2) (A). Here, Knott concedes that he would be ineligible under the $ 2,000,000 net worth limitation. RMC would not be barred, however, because its net worth does not exceed $7,000,000 and it has never had more than 500 employees.

Knott argues that he is not subject to the net worth limitation or the cap on fees because defendants may elect to proceed under either *28 U.S.C. § 2412*(b) or (d). No Circuit Court of Appeals has yet construed the Hyde Amendment's incorporation of the procedures and limitations of the EAJA and the district courts which have addressed this issue are split. Some conclude that the procedures and limitations of the EAJA are contained in § 2412(d). See *United States v. Peterson, 71 F. Supp. 2d 695, 698 (S.D.Tex. 1999);* Gardner at 1289. Another district court has held that the procedural limitations set forth in § 2412(d) are not applicable if the prevailing party chooses to seek attorneys' fees under §2412(b). See *United States v. Holland, 34 F. Supp. 2d 346, 358 (E.D.Va. 1999),* vacated in part on other grounds by *U.S.*

V. Holland, 48 F. Supp. 2d 571 (E.D.Va. 1999).

This Court is persuaded that the cases holding that the procedures and limitations of § 2412(d) apply to Hyde Amendment applications are better reasoned and adopts the reasoning of the district court in *United States v. Peterson, supra,* which found that the limitations of § 2412(d) apply to applications made under the Hyde Amendment.

The Court does so for three reasons. First, to allow a Hyde Amendment fee applicant to proceed under either subsection would require the court either 1) to ignore and read out of § 2412(b) the clause "under the terms of any statute ...," or 2) to ignore and read out of the Hyde Amendment its express adoption of the procedures and limitations of § 2412, in contravention of its plain statutory language. Peterson at 699.

Second, the Hyde Amendment was enacted in order to "incorporate the EAJA into the criminal context to the extent applicable." Id. (quotation omitted). If this Court adopted Knott's view of the Hyde Amendment, however, every litigant would choose to proceed only under § 2412(b), thereby avoiding all limitations of § 2412. Id.

Third, waivers of sovereign immunity are to be narrowly construed and the award of legal fees is such a waiver. See Gardner at 1297 n. 24.

Because this Court concludes that the procedures and limitations of § 2412(d) apply to defendants' fee application, Knott, whose net worth exceeds $ 2,000,000, is ineligible for an award. This Court is unpersuaded by the government's argument that RMC is an alter ego of Knott and finds that RMC is not similarly barred by the limitations of § 2412(d) but rather, is eligible for an award of fees.

B. "Vexatious, Frivolous or In Bad Faith"

Whereas the government must prove that its position was substantially justified when faced with a motion for attorneys' fees under the EAJA, under the Hyde Amendment, the movant seeking an award of attorneys' fees must show more. See *United States v. Truesdale, 211 F.3d 898, 909 (5th Cir. 2000).* A Hyde Amendment applicant has the burden of proving, by a preponderance of the evidence, that the government's position was "vexatious, frivolous or in bad faith (emphasis supplied)." Because those words are not defined in the statute, they "must be given their ordinary meaning." *United States v. Gilbert, 198 F.3d 1293, 1298 (1999),* quoting *Chapman v. United States, 500 U.S. 453, 462, 114 L. Ed. 2d 524, 111 S. Ct. 1919 (1991).*

"Vexatious" means "without reasonable or probable cause or excuse." Black's Law Dictionary 1565 (6th Ed. 1990). A charge is "vexatious" if it is calculated to "harass, disquiet or annoy." Id. A "frivolous action" is one that is "groundless ... with little prospect of success; often brought to embarrass or annoy the defendant." Black's Law Dictionary 668 (6th Ed. 1990). "Bad faith" is not simply bad judgment or negligence, but rather it "implies the conscious doing of a wrong because of dishonest purpose or moral obliquity; ... it contemplates a state of mind affirmatively operating with furtive design or ill will." Black's Law Dictionary 139 (6th Ed. 1990). Gilbert at 1303.

Courts have awarded fees under the Hyde Amendment when the prosecution "clearly violated the law or pursued baseless charges unjustifiably." *United States v. Pritt, 77 F. Supp. 2d 743, 748 (S.D.W.Va. 1999).* In other words, the defendant must show that the government's legal position was asserted "in bad faith or without any foundation or basis for belief that it might prevail." Gilbert at 1303. A Hyde Amendment applicant must show that the government's position underlying the prosecution amounts to prosecutorial

misconduct. Gilbert at 1299.

Here, defendants were prosecuted for violating the Clean Water Act by discharging waste with a pH of less than 5.0 S.U. into the public sewer. The government did not, however, have any credible evidence to support that accusation. To the contrary, the samples taken at Manhole # 2, the point of discharge into the public sewer, showed that RMC was not in violation of the Clean Water Act.

Further, the EPA's collection of evidence in support of the government's charges is suspect. At the October inspection, the EPA ignored the clear condition that Knott imposed upon his consent for the inspection of RMC's facilities and surreptitiously obtained samples in the absence of RMC personnel. Defendants presented credible evidence that recorded sample readings were altered by someone. Apparently, several recorded readings in the pH "7" range taken at both Manholes # 1 and # 2 were altered to look like readings in the "2" and "4" ranges.

During the October inspection, Knott informed the EPA agents that he owned Riverdale Street. In later applying for a search warrant, an EPA official acknowledged that if RMC owned the sewer under Riverdale Street "the discharge might not enter the town sewer system until it reaches the main sewer connection [Manhole # 2]." That indicates that the EPA was aware of Knott's ownership claim.

Furthermore, counsel for defendants told the government on November 18, 1997 that RMC's wastewater streams were neutralized before reaching the public sewer. At the very least, the government was aware, on December 19, 1997, when Knott escorted government agents on a tour of the RMC facility, of his claimed ownership of Manhole # 1, the sewer line running to Manhole # 2 and Riverdale Street. Moreover, Knott followed up by sending documentation to

the prosecutor confirming that he owned that property as he had represented.

The government knew, or should have known, that RMC's discharge did not enter the public sewer until it reached Manhole # 2, yet for unexplained reasons, the government failed to take further samples there. There were no obstacles to its doing so because Manhole # 2 is on public property, leaving the impression, at least, that the government took no more samples at Manhole # 2 because it had no reasonable expectation of discovering a violation of the CWA by doing so.

Instead, in the absence of evidence of an illegal wastewater discharge into the public sewer at Manhole # 2, the government persisted in the presentation of evidence to the Grand Jury. The defendants' humiliation at being criminally prosecuted was intensified when the United States Attorney and the EPA issued a Press Release following the indictment which stated that RMC and Knott were knowingly polluting the rivers of the Commonwealth.

A small number of samples which had been obtained at Manhole # 1 indicated that RMC was not discharging wastewater in violation of the applicable limit. The government failed, however, to produce a laboratory log from the November search revealing that exculpatory information as part of its automatic discovery disclosures on September 14, 1998. Instead, it stated that "The United States is unaware of the existence of any exculpatory evidence." The government provided the exculpatory evidence only after defendants specifically requested the log.

This Court is also troubled by the government's unnecessary harassment of defendants and their employees during the November search. At that time, a virtual "SWAT team" consisting of twenty-one EPA law enforcement officers

and agents, many of whom were armed, stormed the RMC facility to conduct pH samplings. They vigorously interrogated and videotaped employees causing them great distress and discomfort.

After consideration of the conduct of the EPA personnel and the government in connection with this case, this Court finds that the United States' prosecution of defendants, although not provably frivolous or in bad faith, was clearly vexatious. Knott is barred from recovering attorneys' fees by the net worth limitation of *28 U.S.C. § 2412*(d), but RMC is entitled to an award of attorneys' fees under the Hyde Amendment. Additional discovery in support of defendants' application for attorneys fees is therefore unnecessary.

C. Calculation of Fee Award

Pursuant to *28 U.S.C. § 2412*(d) (2) (A) (ii), recovery of attorneys' fees is capped at $ 125 per hour. RMC has not shown that the three attorneys it retained were "qualified" in some "specialized sense" or that they had some "specialized skill needful for the litigation in question" as required to be reimbursed at a higher rate. Further, because Knott does not satisfy the net-worth limitation of § 2412(d) (2) (B) (i) and is not, therefore, entitled to an award of attorneys' fees, the amount requested for the joint representation of Knott and RMC will be reduced accordingly. The number of hours incurred by each of the defendants' attorneys will be reduced by one-half and the resulting total hours will be reimbursed at the statutory rate of $ 125. Attorneys' costs will be similarly reduced.

Knott, on behalf of RMC, requests reimbursement for litigation expenses, exclusive of attorneys' fees and expenses, as follows:

(1) expert witness fees	$ 6,998.69
(2) costs of tests and studies	30,110.50
(3) private investigator fees	500.90
(4) copying expense	223.17
(5) costs of a projector and tape recorder	4,708.85
(6) miscellaneous expense	895.12
(7) automobile expense	729.78
(8) cost of service of witness subpoena	244.00
(9) fees paid to a public relations firm	2,520.93
TOTAL:	$ 46,931.94[10]

RMC is entitled to reimbursement for costs associated with expert witnesses, tests and studies, copying, transportation and service of witness subpoenas but it will not be reimbursed for its expenditures for a private investigator or for public relations services. Reimbursement for the cost of a projector and a tape recorder may be appropriate if it were a necessary rental expense, but because RMC fails to specify whether that equipment was rented or purchased or exactly what the equipment was used for, RMC will not be reimbursed for that expenditure. Moreover, "miscellaneous expenses" will not be reimbursed because no detail is provided. Because the allowed litigation expenses were incurred partially in Knott's defense, they will be reduced by one-half and RMC will be reimbursed for litigation expenses in the amount of $ 19,153.07.

Thus, the Court finds that RMC is entitled to an award of attorneys' fees and expenses as follows:

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[2] Knott submitted Schedule A to his Affidavit with a modest mathematical error. The total of the submitted expenses is $46,931.94, not $46,631.94 as claimed.

Attorneys' Fees:

Jamy B. Buchanan	245.5 hours / 2 x $ 125	$ 15,343.75
Henry T. Dunker[11]	159.9 hours / 2 x $ 125	$ 9,993.75
Warren G. Miller	341.1 hours / 2 x $125	$ 21,318.75
		$46,656.25

Attorney's Costs:

Jamy B. Buchanan	$ 5,564.63 / 2	$ 2,782.31
Henry T. Dunker	$ 104.42 / 2	$ 52.21
Warren G. Miller	$ 164.31 / 2	$ 82.16
		$ 2,916.68

Litigations Expenses: (see summary above)		$ 19,153.07
	TOTAL:	$68,726.00

ORDER

For the foregoing reasons, with respect to RMC's request for an award of attorneys' fees and expenses, defendants' motion for attorneys' fees (Docket No. 51) is hereby **ALLOWED**. The United states shall reimburse RMC for attorneys' fees and expenses in the amount of $ 68,726.00 as more fully set forth in the Memorandum above. Defendants' motion for leave to conduct discovery and

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[3] Henry Dunker's Affidavit also contains a mathematical error. He claims that he billed defendants $25,564 for legal services. The itemizations attached to his Affidavit show, however, that he charged $25,584.

request for oral argument (Docket No. 70) is hereby **DENIED**, as moot.

So ordered.

Nathaniel M. Gorton

United States District Judge

Dated: July 27, 2000

United States Court of Appeals
For the First Circuit

No. 00-2238
No. 00-2239

UNITED STATES,
Appellant\Cross - Appellee,

v.

JAMES M. KNOTT, SR.; RIVERDALE MILLS CORP.,
Defendants - Appellees\Cross - Appellants.

ORDER OF COURT

Entered: July 26, 2001

Upon consideration of appellees' "Motion to Extend Time Within Which to File a Petition for Rehearing and Rehearing En Banc",

It is ordered that the time for appellees to file their petition for rehearing and rehearing en banc be enlarged to and including August 10, 2001.

By the Court:

JANICE M. O'NEIL

Acting Clerk.

United States Court of Appeals
For the First Circuit

No. 00-2238
No. 00-2239

UNITED STATES,
Appellant\Cross - Appellee,

v.

JAMES M. KNOTT, SR.; RIVERDALE MILLS CORP.,
Defendants - Appellees\Cross - Appellants.

Before

Boudin, Chief Judge,
Torruella and Selya,* Circuit Judges,
Cyr, Senior Circuit Judge,
Lynch and Lipez, Circuit Judges

ORDER OF COURT

Entered: August 24, 2001

The panel of judges that rendered the decision in these cases having voted to deny the petition for rehearing and the suggestion for the holding of a rehearing en banc having been carefully considered by the judges of the Court in regular active service and a majority of said judges not having voted to order that the appeals be heard or reheard by the Court en banc,

It is ordered that the petition for rehearing and the suggestion for rehearing en banc be denied.

By the Court:

JANICE M. O'NIEL

Acting Clerk.

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*Judge Selya is recused from this matter.

history told Mr Bhatt that concerned that treatment plant not operational and was discharging to city sewer!

Riverdale Road is claimed to be owned by Dr Bhatt

explained low pH at Noon Time when discharge

Mr. Bhattacharya: on any 6 month city reads city effluent meter

& sends bill to Corp.

Mr Bhatt not sure if operator work... Bhatt 9 to 5 - 90 for week

Sewer permit not of facility at ~~the other~~ office This location must be where

↑ 6 to 12 operation not be one ~~not~~ to be Bhatt no limitations

plant on the according to Jim Knott

N ←

1548 picture pH

proposed area

6" sloped pipe

MH & M

N.D. flow pH 7

low flow pH 7

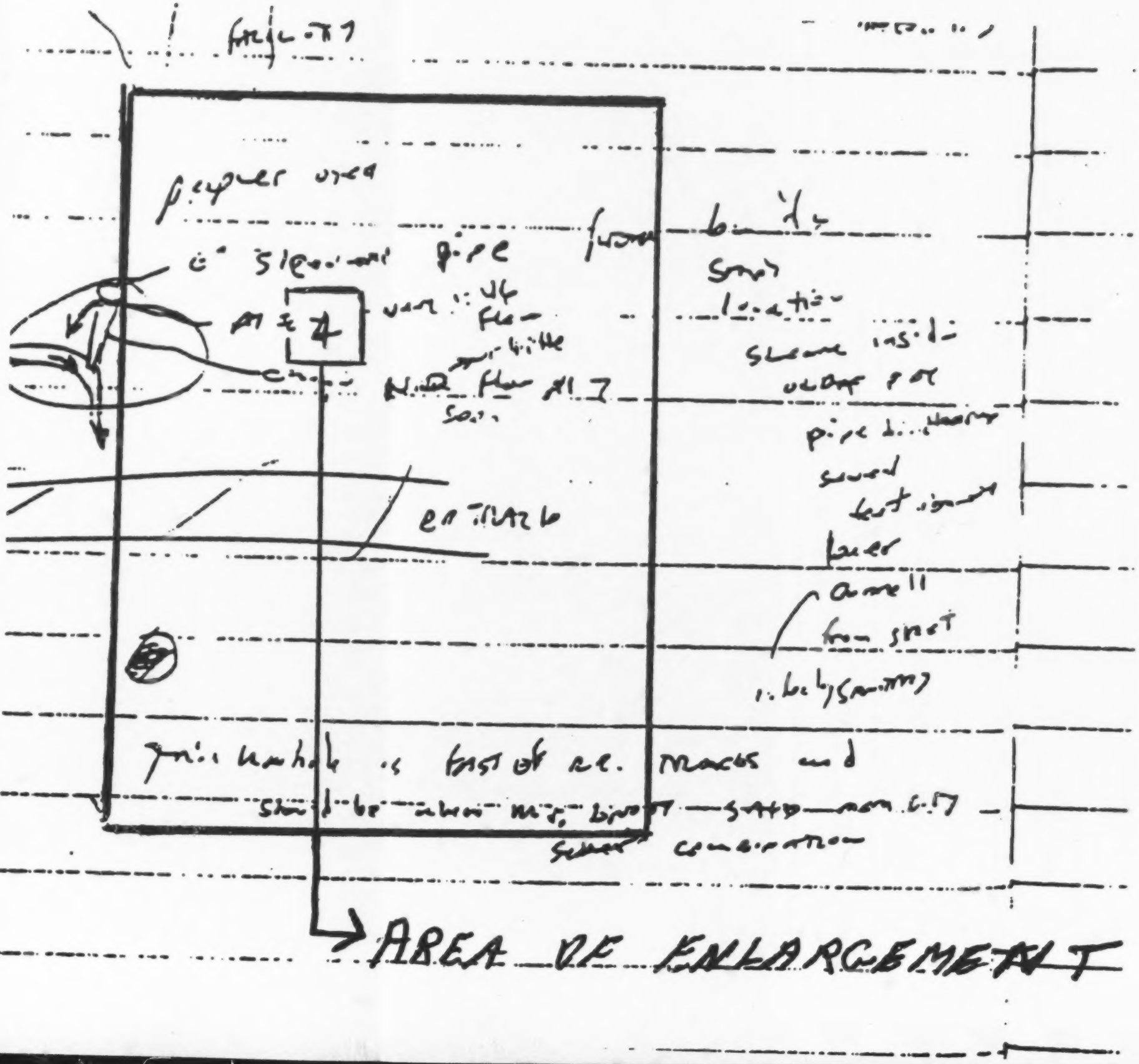
Jim Knott ~ top of ex. manhole

1550 w flow pH 7

1647 pH Neut

→ AREA OF ENLARGEMENT

BEST AVAILABLE COPY

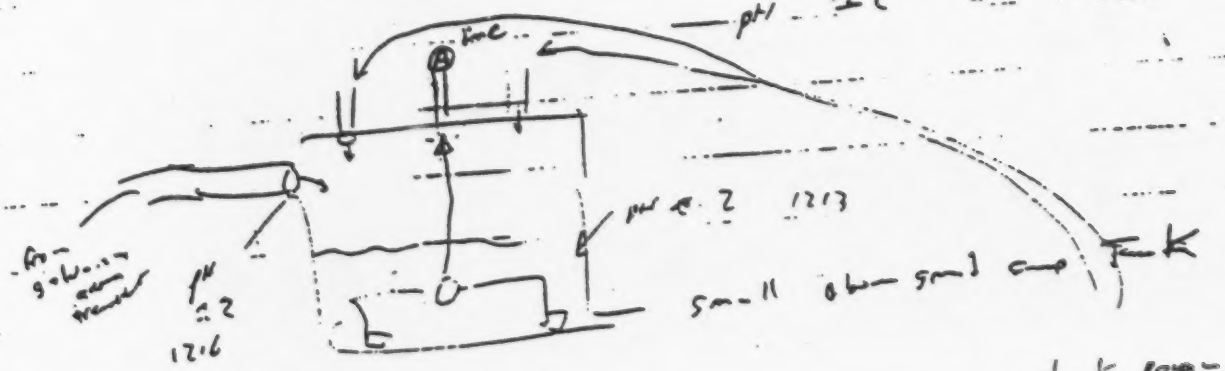

proper area
from
location
sleeve insid
pipe
sewer
AREA OF ENLARGEMENT

Lowest point in plant at SG blow down basement ground floor

3 inch pipes

Rinse water for solution catch lines

pH 12 at 1213



Upstairs first go two dark room printer operators on R side is sink ... Sub Systems Company

TRACED B inch to final outfall when crawler

Rich water from CONTAINED BOOK out for line flow

to going to basement area & then to outside manhole

outside manhole shower ran back to pH

12 40	2.59	
12 48	2.29	good flow 20 cm or more
12 43	7.48	good flow
12 44	2.33	good flow
12 45	2.29	good flow
12 47	2.25	good flow pH neut = 2
12 48	2.24	
1250		NOT much flow
1302	2.31	good water for neut pH
1304	2.20	water at pH 2

000929

outside manhole

1240	2.59	
1248	2.29	good flow
1243	2.28	good flow
1244	2.33	good flow
1245	2.29	good flow
1247	2.25	good flow
1248	2.24	
1250		not much flow
1302	2.31	good flow
1304	2.20	good flow